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THE MYTHS OF *MACPHERSON*

John C. P. Goldberg[†] and Benjamin C. Zipursky[‡]

INTRODUCTION

In 1910, Donald MacPherson bought a new Buick Runabout from Close Brothers, a dealership in upstate New York. A year later, he was seriously injured when the car veered off the road as he drove it. MacPherson sued Buick for negligence. His suit alleged that Buick was careless in marketing a car with a wheel containing a latent defect, which caused the wheel to crumble and the car to crash. After a verdict for MacPherson was affirmed by an intermediate appellate court,¹ Buick appealed to New York's high court.

Buick's hopes for reversal rested mainly on English and New York precedents that had set limits on the classes of persons to whom manufacturers owed a duty of care. The most significant of these was *Winterbottom v. Wright*, decided by the English Exchequer Court in 1842.² Wright had contracted with the English Postmaster General to provide a coach for use in mail delivery along a certain route. The horses and drivers for the coach were provided to the Postmaster General by a third party named Atkinson. Winterbottom, a driver hired by Atkinson, was seriously injured when the coach overturned. Winterbottom sued Wright, claiming that Wright had acted carelessly in providing the Postmaster General with an unsound coach. The English court rejected Winterbottom's claim, establishing what would come to be known as the "privity" rule. Wright's duty to take care to provide sound coaches, the court reasoned, was owed only to the Postmaster General. As to downstream users such as Winterbottom, Wright owed no duty of care.

Other precedents cut against Buick on the duty issue. The New York Court of Appeals' 1852 decision in *Thomas v. Winchester* involved the sale of a bottle containing poison that had been mislabeled by the manufacturer so as to indicate that it contained medicine.³

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[‡] James H. Quinn Professor, Fordham University School of Law. We are delighted to revisit *MacPherson v. Buick* on the occasion of its centenary. Some arguments made herein are elaborations of those made in our first co-authored article. John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998). Thanks to Professor Anthony Sebok and the AALS Torts Section's Executive Committee for inviting us to participate on this panel, and to our fellow panelists. Thanks also to Andrew Gold and John Witt for helpful comments. Our research is generously supported by Fordham University School of Law and Harvard Law School.

¹ *MacPherson v. Buick Motor Co.*, 160 A.D. 55 (N.Y. App. Div. 1914), *aff'd*, 111 N.E. 1050 (N.Y. 1916).

² 152 Eng. Rep. 402 (Ex. 1842).

³ 6 N.Y. 397 (1852). Whether the substance—belladonna—that poisoned Thomas is fairly characterized as a "poison" rather than a "medicine" is a more delicate question than first appears, given that belladonna had and has medicinal uses. It is, however, toxic when used in doses appropriate to the substance identified on the bottle's label (extract of dandelion).

The plaintiff ingested the substance—belladonna—only after it was sold to her husband through intermediaries. *Thomas* reasoned that mislabeled poisons pose a special kind of danger, hence a duty was owed to the ultimate consumer notwithstanding the lack of privity between manufacturer and consumer. Subsequent Court of Appeals decisions declined to apply the privity rule to various products, including a scaffold erected for the use of workers in painting a building, a glass bottle containing aerated water, and a large coffee urn.⁴

In *MacPherson*, the Court of Appeals ruled 6-1 to affirm the jury's verdict for the plaintiff.⁵ Cardozo's majority opinion teased out from the precedents a general rule of duty for manufacturers far broader than *Winterbottom's*. Under this rule—which Cardozo deemed applicable only to products that endanger life or limb, and that are not likely to be inspected for safety after their initial sale—a manufacturer owes a duty of care to *all persons within the class of persons who would probably be among those injured if the product were carelessly made*.

Applying the rule to the facts of the case, Cardozo concluded that Buick owed a duty of care to MacPherson. Physical harm to an occupant of a mass-manufactured automobile capable of speeds of 55 miles per hour was a probable outcome of a manufacturer's careless failure to ensure its vehicles were free of latent defects in key components. Moreover, dealers and consumers could not be expected to identify such defects on their own. Therefore a duty was owed by Buick to such persons, irrespective of privity. Given the jury's finding that Buick had breached this duty by failing adequately to test the wheel and had thereby caused MacPherson to be injured, Buick was liable to MacPherson for negligence.

MacPherson has called forth from judges and academics many of the laudatory adjectives used to describe important cases: canonical, iconic, and mythical. In this paper we want to focus on the “mythical.” Regrettably, a good deal of scholarship on *MacPherson* has fostered myths about the decision. Three in particular will serve as our focus. The first concerns the concept of duty in negligence law. The second concerns common law reasoning. The third concerns the relationship of negligence to strict products liability.

Part I describes the myths, which we expect will be familiar to torts scholars and other legal academics. Part II identifies what renders each myth mythical and then advances a better account of duty, judicial reasoning, and the relationship between negligence and products liability. Part III explains why it is critical that we get over the myths of *MacPherson*, explaining the damage they have done to modern tort law, notwithstanding that *MacPherson* itself was an engine of commendable change. A century after the fact, it is all the more important to be clear on what the great case of *MacPherson v. Buick* actually stands for.

I. *MACPHERSON*: STANDARD ACCOUNTS

A. Impersonal Duties, Not Relational Duties

As a matter of formal legal doctrine, the issue posed by *MacPherson* was one of “duty.” So says Cardozo's opinion at the outset: “The question to be determined is whether the

⁴ *Devlin v. Smith*, 89 N.Y. 470 (1882) (scaffold); *Torgesen v. Schultz*, 84 N.E. 956, 957 (N.Y. 1908) (aerated water); *Statler v. George A. Ray Mfg. Co.*, 88 N.E. 1063 (N.Y. 1909) (coffee urn).

⁵ *MacPherson v. Buick*, 111 N.E. 1050 (N.Y. 1916).

defendant owed a duty of care and vigilance to any one but the immediate purchaser.”⁶ Crucially, this question is framed *relationally*. It asks whether Buick owed it *to* someone other than its dealers to take care to make its cars safe. Implicit in this framing is the possibility that, for some persons injured by Buick’s carelessness, there would be no liability because the company owed them no duty of care.

Despite having so framed the question, Cardozo is usually praised for not taking it at face value. Indeed, he is praised for being ‘ahead of the curve’ in recognizing that a relational notion of legal duty makes no sense for a body of tort law meant to govern a populous modern society characterized by routine interactions among strangers.⁷ Law for the modern world, it is supposed, is law that recognizes that the duty of care in negligence law does not attach to *relationships* (personal, contractual, or otherwise) but to individuals and their actions. In short, it is a simple, nonrelational duty—a duty to act with reasonable care, full stop.⁸

Of course negligence liability was and is regularly imposed as a result of interactions between persons who are not strangers. A doctor can be held liable to a patient for malpractice, and a business can be held liable to a client for an injury caused by its unsafe premises. Yet, even in these cases—according to the mythmakers—the relationship is not necessary for the existence of the duty of care and it is not the source of the duty, either. Whether interacting with a client or a stranger, one’s duty is always the same. It is not a duty owed to any persons in particular; it is a duty owed to the state or to the world. *MacPherson*, on this reading, rightly rejected the privity limit *because it rightly rejected the idea that a legal actor’s duty of care is relational – owed to a person or members of a class of persons*.

And yet if Cardozo did adopt a simple, nonrelational conception of duty, an interpretive puzzle arises. Recall that the issue Cardozo posed at the outset of his opinion is whether Buick owed a duty of care to a person such as MacPherson. If the duty of care is a simple duty to act reasonably, there is no point in asking this question, for the only possible answer is “yes.” The duty of care, conceived as a simple duty, is owed to everyone. Given this conception, it would be incoherent to suppose that a negligence claim against Buick could fail because Buick owed no duty to take care in the manufacturing of its cars. A simple duty of care is always present, always owed.

Why, then, did Cardozo seem to suppose that there was something meaningful to talk about under the heading of “duty”? An answer to this puzzle was most famously proffered twenty-five years later by William Prosser, the leading torts scholar of the mid-Twentieth Century. According to Prosser:

The statement that there is or is not a duty begs the essential question—whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct. ...

⁶ *Id.* at 1051.

⁷ See, e.g., G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 125 (Expanded ed. 2003); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 936-38 (1981).

⁸ This conception of duty, advocated prominently in Holmes’s writings, would later be endorsed by Prosser and many others. See Goldberg & Zipursky, *supra* note ††, at 1752-66 (laying out Holmes’s and Prosser’s views).

It is a shorthand statement of a conclusion, rather than an aid to analysis itself. “[D]uty” is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.⁹

The duty question cannot, on a nonrelational conception, be a question about whether the defendant owed it to the plaintiff to take care. But it does not follow that there is nothing for judges to consider under the heading of “duty.” Instead, judges could pose for themselves a different question: whether policy considerations favor or disfavor the negligence claims of a certain class of plaintiffs against a certain class of defendants.

Looking back, Prosser argued, this is exactly what had happened in *Winterbottom*. The English judges framed their ruling as a no-duty ruling, yet the outcome in that case rested on their underlying judgment that (in the words of Lord Abinger) “the most absurd and outrageous consequences” would result if anyone injured by a carelessly made product could sue the manufacturer.¹⁰ *Winterbottom*’s no-duty ruling, like all no-duty rulings, is best understood as a judicial grant of an *exemption* from the default rule that liability will attach when one person carelessly injures another. *Winterbottom* never denied that manufacturers were under some duty to take care that their products not injure others. After all, those in privity could recover for their product-related injuries. Rather it had adopted a policy-based limit on the aggregate liability facing manufacturers; one that, in the name of the greater good, blocked many victims of careless conduct from recovering damages.

According to Prosser and others, one of Cardozo’s great achievements in *MacPherson* was to perceive that the reduction of the morally tinged duty issue to a question of public policy need not have the regressive valence given to it by decisions such as *Winterbottom*. Indeed, the deconstruction of duty promised to *liberate* judges to remake negligence law in a more progressive mold. To appreciate—as Cardozo is said to have appreciated—that duty is “not sacrosanct in itself” is to recognize that everything turns on the underlying policy question. What a judge faced with a duty question needs to determine is whether there are compelling reasons to insulate manufacturers from liability for injuries caused by their carelessly made products. Even if a broad exemption might have been warranted for manufacturers in 1842, by 1916 it was not. If anything, by the latter date there were powerful reasons of deterrence and compensation to hold Buick and other manufacturers liable. If duty is policy, and policy factors favor liability for negligence, then judges had no reason to provide manufacturers with the protection of the privity rule.

B. Legislation, Not Adjudication

Negligence cases like *Winterbottom* and *MacPherson* seem in the first instance to deal with “private” matters. These are disputes between an injurer and a victim that call for an

⁹ WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 180 (1941).

¹⁰ *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (Ex. 1842); PROSSER, *supra* note 9, § 31, at 179 (arguing that mid-nineteenth century English courts developed the concept of relational duty to limit liability of nascent industry); *id.* § 83, at 674 (discussing the policy rationale for limiting liability of product sellers).

adjudication of the rights and duties of each. Broader questions as to the social value or significance of validating or rejecting the plaintiff's complaint at best lurk in the background.

The standard account of *MacPherson* praises Cardozo for having moved beyond a private-law conception of tort so as to grasp the centrality to tort law of its "public" dimension.¹¹ Of course the Court of Appeals was most immediately faced with deciding whether Buick was required to pay damages to MacPherson. But in answering that question, the Court was setting out a rule regulating manufacturer behavior and determining the ability of consumers to obtain compensation for product-related injuries. Cardozo, it is said, recognized that the *adjudicative* task facing the Court of Appeals—deciding Buick's liability to MacPherson—boiled down to the *legislative* task of fashioning a rule that would properly incentivize manufacturers, or would provide appropriate compensation to persons injured by poorly made products.

For these reasons, *MacPherson* has been cast as an important instance of a sophisticated, modern judge recognizing that tort law is really a species of public law. Judges presiding over tort cases are not village elders who gather to ponder how neighbors ought to treat one another. They are government officials charged with attending to the public welfare. More than anything else, tort law is a delegation of power to judges (and juries) to issue rules and regulations that can be expected to redound to the public good, either because the threat of tort liability will deter unsafe, antisocial conduct, or because tort liability will help injury victims shift the cost of their losses to others who, for one reason or another, ought to bear those losses. Just as *Winterbottom* was a conscious or semi-conscious effort at legislating *laissez faire*, *MacPherson*, the thinking goes, turned on Cardozo's quite deliberate rejection of that policy in favor of a more progressive, consumer-protective policy.

This perspective on *MacPherson* was fueled in part by the famous set of lectures that Cardozo later gave at Yale Law School.¹² In *The Nature of the Judicial Process*, Cardozo candidly acknowledged the role of discretion in appellate adjudication and the need for judges to look beyond precedents to reach sensible decisions in contested cases. Seen in this light, *MacPherson* is taken to epitomize the triumph of a functionalist approach to adjudication over a formalistic conception of adjudication as a mere exercise in logic. A formalistic judge might have supposed that *MacPherson* could and should be resolved by a divination of the true meaning of the phrase "inherently dangerous," or by an arid exercise in analogy. (Are cars more like coaches and steam boilers, or more like medicines, scaffolds, and coffee urns?) Cardozo, it is supposed, recognized that any such exercise was of limited value and that the case before the Court posed the question of whether, in light of the social realities of manufacturer-consumer transactions, it would be useful and fair to hold car manufacturers liable for carelessness causing injury to consumers.

Relatedly, *MacPherson* is said to have discarded an older conception of common law in favor of a more modern and more plausible conception. On a traditional understanding of common law's authority, the rules and principles announced by judges in the course of

¹¹ RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 108-09 (1990); Leon Green, *Tort Law Public Law in Disguise* (Part I), 38 *TEX. L. REV.* 1, 9-10 (1938) (emphasizing the "policies that lie at the base of the decision").

¹² BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

deciding particular disputes claim authority for the general population in large part because those rules and principles roughly track prevailing social norms. Judge-made common law could demand allegiance only insofar as it embodies longstanding custom; its rules could then claim to be rules that members of society already held ‘in common.’ Conversely, judicial decisions that were out in front of conventional norms, or flouted them, would expose judge-made law to criticism for being illegitimate.

Modern society’s increasing heterogeneity undermined this effort to link the common law’s legitimacy to its incorporation of prevailing norms. No longer could judge-made law be justified as reflexively applying rules already to some degree recognized in everyday life. Instead, if there were any justification for the imposition of law by judges, as opposed to democratically elected legislatures or expert regulators, it would have to be that judges were capable of making sensible policy decisions. *MacPherson* was a testament to this possibility. Cardozo adopted a rule grounded in a plausible conception of what courts could and should do to improve product safety without overburdening manufacturers. The legitimacy of his decision rested on its soundness as a piece of regulatory policy.

C. The Continuity between *MacPherson* and Strict Products Liability

The third of our three myths pertains to the significance of *MacPherson* for the development of tort law and tort theory. It can be stated as follows. Even though *MacPherson* was a negligence decision, in retrospect it can be understood as setting out an embryonic form of the doctrine of strict products liability. *MacPherson*, the thought goes, reflected a progressive and pragmatic appreciation of the need to adjust negligence doctrine to achieve the goals of tort law in the domain of product-related injuries. The law of products liability that emerged in the 1960s emerged for just the same reasons. *MacPherson* eliminated the regressive formality of privity. Landmark products liability decisions such as *Escola* and *Greenman*,¹³ along with Section 402A of the Second Torts Restatement,¹⁴ stripped away additional formalities—especially the notice requirements of warranty law, and the negligence requirement of proving not only the presence of a defect in the injury-generating product but also the careless conduct that generated the defect—that had impeded tort law’s ability to achieve its compensatory and deterrent purposes.

The claim that *MacPherson*’s practical significance resides in its having served as a forerunner of strict products liability is not difficult to find. Torts casebooks overwhelmingly present the decision in just this manner.¹⁵ That they do so is hardly surprising. Indeed, Justice Roger Traynor’s famous concurrence in *Escola*—the opinion that paved the way for the adoption of strict products liability—explicitly invoked *MacPherson* as a key precedent.¹⁶ For his part, Traynor doubtless was pleased to remind those who might be skeptical of his

¹³ *Greenman v. Yuba Power Prods. Inc.*, 377 P.2d 897 (Cal. 1963); *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 465 (Cal. 1944) (Traynor, J., concurring).

¹⁴ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

¹⁵ See, e.g., RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 720 (10th ed. 2012); MARC A. FRANKLIN, ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 551 (9th ed. 2011); VICTOR E. SCHWARTZ, ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 746 (12th ed. 2010).

¹⁶ *Escola*, 150 P.2d 436, 465 (Cal. 1944) (Traynor, J., concurring).

proposed doctrinal revision that a member of the American judicial pantheon had largely made his reputation on a ‘comparable’ revision. More substantively, Traynor seems to have understood *MacPherson* as supporting his mission to replace an older, abstract, and confiningly moralistic approach to tort law, represented by *Winterbottom*, for a modern, engaged, pragmatic approach, supposedly epitomized by *MacPherson*.

Twenty years later, writing for the majority in the *Greenman* case—among the first decisions overtly holding a manufacturer liable on a tort theory of strict products liability—Traynor no longer needed to invoke *MacPherson*, but instead could merely cite to his *Escola* opinion to confirm the emergence of an instrumental approach to liability for product-related injuries:

We need not re canvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated in the cases cited above. (See also 2 Harper and James, Torts, ss 28.15-28.16, pp. 1569-1574; Prosser, Strict Liability to the Consumer, 69 Yale L.J. 1099; *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461, 150 P.2d 436, concurring opinion.) The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best. (See Prosser, Strict Liability to the Consumer, 69 Yale L.J. 1099, 1124-1134.)¹⁷

The claim that *MacPherson* morphed almost effortlessly into *Escola*, *Greenman* and Section 402A rests in part on Cardozo’s insistence that liability for product-related injuries must be seen as a matter of tort, not contract. The absence of a contract between *Winterbottom* and *Wright* had doomed *Winterbottom*’s claim: if *Winterbottom* had wanted protection against the risk of injury, he should have (in Baron Alderson words) “made himself a party to the contract.”¹⁸ *MacPherson* changed all this. Consumers no longer needed to contract for protection against product-related injuries, and manufacturers could no longer avoid liability by structuring their affairs to avoid contracting directly with consumers. Decades later, Traynor seized on this aspect of *MacPherson* to explain why the warranties of quality that had previously been understood to be contractual in nature should no longer be limited by the formalities of the “law of sales.” Warranties of safety may have started off as creatures of contract, but like the duty of care in negligence, they were no longer to be based on contract, but instead were grounded *in the law*.

Moreover, while *MacPherson* was, of course, an application of the law of negligence, Cardozo seemed to have implicitly recognized that the notion of “fault” at work in tort law is sufficiently capacious as to blur, if not efface, not only the line between negligence and strict liability, but also between liability understood as backward-looking accountability for wrongdoing (on the one hand) and liability understood as a means of regulating behavior in a forward-looking effort to achieve deterrence and compensation (on the other).

¹⁷ *Greenman*, 377 P.2d at 901.

¹⁸ *Winterbottom v. Wright*, 152 E.R. 402, 405 (Ex. 1842).

The judgment for *MacPherson* obviously rested in part on a jury finding, affirmed by the Court of Appeals, that Buick had been careless. But if there was ‘fault,’ it was arguably not fault in the sense of a moral wrong. Buick purchased its wheels from a reputable manufacturer, and it road-tested each of its cars once assembled. At trial, experts for the plaintiff asserted that additional testing would have led to the discovery of the defective wheel, but the evidence on this point was hardly overwhelming.¹⁹ Decisions such as *MacPherson* demonstrated that, in practice, negligence law’s conception of fault permits juries to impose liability more or less as they see fit. Strict products liability could thus be seen as but a candid acknowledgment of the point that, in the domain of product-related injuries, liability is not best understood as redress for wrongs, and that, instead, liability should be understood primarily as a means of achieving loss-spreading and deterrence.²⁰

The emerging regulatory conception of product liability law went hand-in-hand with the idea that, in a modern economy, “consumer protection” is one of government’s basic duties. On this point, too, *MacPherson* is cast as being a cutting-edge decision. When it comes to mass-produced, mass-marketed goods, it says, the consumer is not in a position to protect himself from product dangers – he will not be testing the soundness of his car’s wheels – and instead relies on the expertise and diligence of manufacturers to produce suitably safe products. In these circumstances, consumers are not only entitled to look to sellers to protect them against product dangers, they are entitled to look to the law to ensure that there is such protection. Again, the issue is not so much accountability for wrongdoing but how law can be harnessed to help ensure that products sold in the commercial marketplace actually are safe.

* * *

To sum up the key claims of this part: *MacPherson* is typically lauded as marking the emergence and indeed triumph of a modern, realistic understanding of tort law and common-law adjudication. Looking past the misleading language of duty, Cardozo is said to have recognized that the *real* ‘duty’ question facing courts is whether to grant a policy-based exception to the ordinary operation of negligence law. Grasping that private disputes are *really* occasions for appellate courts to make regulatory policy, and rejecting the fiction that law is found, not made, he is alleged to have fashioned a rule grounded in a sensible policy

¹⁹ James Henderson, Jr., *MacPherson v. Buick Motor Company: Simplifying the Facts While Reshaping the Law*, in TORT STORIES 41, 43-44, 47-48 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

²⁰ W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS, § 98, at 692-93 (5th ed. 1984) (identifying loss-spreading, deterrence and legal process/burden of proof considerations as the three policies served by strict products liability). In an offhand remark in his landmark article on causation, Guido Calabresi suggested that *MacPherson* should be understood as driven by “market deterrence or compensation goals.” Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 95 n. 36 (1975). Overt regulation by state government officials of certain aspects of automobile safety—including requirements for headlights and windshield glass—were underway in the 1920s and 30s. See Sally H. Clarke, *Unmanageable Risks: MacPherson v. Buick and the Emergence of a Mass Consumer Market*, 23 LAW & HIST. REV. 1, 42-44 (2005).

rationale. Eschewing facile moralism, and attuned to the emerging *reality* of the modern, regulatory state, he is credited with recognizing that the key question with respect to liability for product-related injuries is not whether somebody has committed a wrong, but whether and how liability might achieve compensation and deterrence.

II. *MACPHERSON* WITHOUT MYTHS

Though widely embraced today, the foregoing accounts of *MacPherson* rest on an interrelated series of misunderstandings about Cardozo's opinion, negligence law, tort law, and law generally.

A. Relational Duty

It is more than a little strange to read into *MacPherson* the notion that legal duties must be understood as running to government, or to the public at large, or to no one at all. As noted above, Cardozo's opinion began by framing the question facing the Court of Appeals as whether a duty of care was owed by a manufacturer *to members of certain classes of persons not in privity with the manufacturer*. And his answer to that question was not that manufacturers owe a duty of care to the world at large. Instead, his opinion reasoned that manufacturers owe a duty to the persons whose life or limb probably would be endangered were their products carelessly made. Indeed, he crisply articulated his understanding of the duty element and the privity problem in a manner that made relationality central: "There is nothing anomalous in a rule which imposes upon A, who has contracted with B, *a duty to C and D* and others according as he knows or does not know that the subject matter of the contract is intended for their use."²¹

The notion that *MacPherson* stands for the embrace of a simple, nonrelational conception of duty rests on a conflation of three ideas. We label these, respectively:

- (i) *relationality* (the idea that duties of care are owed to persons or members of classes of persons);
- (ii) *relationship-sensitivity* (the idea that the scope, and in some circumstances, the existence, of a duty of care will turn on the relationship between the persons in question); and
- (iii) *relationship-dependence* (the idea that no duty of care is owed by one person to another unless there is a contract or a pre-existing status-based relationship between them).

With these ideas pulled apart, it quickly becomes clear that one can reject (iii) without rejecting (i) or (ii). The fact that negligence law recognizes duties of care running between and among strangers does not establish that these duties are nonrelational in their analytic structure. Nor does it establish that preexisting relationships between injurer and victim are irrelevant to the existence and scope of the tort duties one owes another.

On the standard account of *MacPherson*, it broke from the older notion of negligence as involving the breach of a relationship-based duty in favor of a modern notion of

²¹ *MacPherson v. Buick*, 111 N.E. 1050, 1054 (N.Y. 1916) (emphasis added).

negligence marked by the recognition of a simple, always applicable, duty of care that runs among strangers. There are many problems with this account, not the least of which is that it relies on bad history. The idea of tort duties running between strangers was hardly unknown to pre-modern law. The eminent historian J.H. Baker reports English cases from as far back as the 1400s in which a property owner is held liable for undertaking an activity on his property that injures a passerby.²² Whatever was erroneous about *Winterbottom*, and correct about *MacPherson*, is not captured by the thought that we once lived in a world that only recognized duties of care within contractual and other pre-existing relationships, and now live in a world where duties run to strangers.

Equally mistaken is the supposition that, in order to reject *Winterbottom*, *MacPherson* was required to adopt the idea that tort duties are owed to the world at large. One could instead take the view—and in fact Cardozo did take the view—that tort duties are owed to all persons within a broad class of persons. A product manufacturer, he reasoned, owes a duty of care to members of the class of persons, some of whom probably will be injured by the product if it is made carelessly and put to ordinary use without further tests or inspections. This class obviously includes persons with no personal connection to the manufacturer. Suppose that, because of Buick’s carelessness, one of its cars crashed while being used in an ordinary manner, resulting in injury to a passenger. The passenger would stand to recover from Buick for negligence. The fact that Buick and the passenger had no previous interactions would be irrelevant.

Under *MacPherson*, the class of persons to whom manufacturers owe a duty of care is a large and indeterminate group whose members cannot be identified in advance. One might therefore be tempted to give a shorthand description of this duty as owed to the public at large. But this shorthand sows confusion, for it quickly slides into the view that the duty of care in negligence really isn’t owed to anyone in particular, but rather is a “simple” or generic duty. As we have pointed out elsewhere, this slide has caused a great deal of mischief in modern thinking about negligence law. For now it is enough to note that it is a slide that Cardozo himself avoided. We know this not only from *MacPherson* itself but from *Palsgraf* as well. Indeed, the misattribution of a nonrelational view of duty to *MacPherson* has played a large part in rendering *Palsgraf* unintelligible to modern torts scholars.²³

It is also important to emphasize that a view of duty such as Cardozo’s can simultaneously insist that the duty of care in negligence is *relational*—always owed to the members of a particular class of potential injury victims—while also insisting that duty in negligence is *relationship-sensitive*, in that the presence or absence of certain kind of pre-tort relationships between injurer and victim might determine the scope of the duty owed and, in certain circumstances, its existence. Doctors owe duties of care to their patients that others do not. So too do businesses with respect to customers on their premises. This is hardly surprising, though again it is a feature of negligence law that modern commentators gloss over. Part of the value of recognizing that tort duties are analytically relational—owed *to* certain others—is that it allows one easily to grasp why relationships matter to the content of the duties actually owed to others. On a duty-to-the-world conception, by contrast, it is

²² J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 409 & n. 40 (4th ed. 2002).

²³ See Goldberg & Zipursky, *supra* note ††, at 1817-21.

something of a mystery why duties of care should be sensitive to the presence or absence of a special relationship.

Finally, as we emphasized many years ago in *The Moral of MacPherson*, there is indeed a sense in which Cardozo accepts that duties of care in negligence law are universal, but there are two ways this can be understood.²⁴ The duty not to batter or defraud another person is universal. Whether one owes this sort of duty to another does not turn on any prior relationship, but on aspects of human well being that one is obligated not to interfere with in certain ways. Likewise, the duty to take care not to injure another person by placing a dangerous product on the market in circumstances where it would imperil their life or limb, does not require an identified right-bearer, but applies to various persons who foreseeably stand to be injured by carelessness. It is a mistake, however, to suppose that the unlimited range of persons to whom a duty is owed means that there are no beneficiaries of the duty, or that the beneficiary is rightly identified as the state or the public. More modestly, even those who join Prosser and others in adopting the duty-to-the-public conception of universality have no basis for attributing that view to Cardozo in *Macpherson* or anywhere else.

B. Pragmatic Conceptualism in Adjudication

One of the interpretive challenges faced by standard accounts is that *MacPherson* in most respects reads like a traditional judicial opinion. Cardozo is concerned to answer the doctrinal question of whether Buick owed a duty of care to a person such as MacPherson. And he answers that question overwhelmingly by means of a careful parsing of precedents, with occasional asides on the immediate practical implications of its analysis. In other words, his opinion seems actually to be concerned to answer the question of whether, under prevailing law, Buick committed negligence against MacPherson.

The suggestion that disguised policy reasoning is the ‘real’ engine of *MacPherson* is driven in part by the thought (which we reject) that, while Cardozo’s doctrinal analysis is presented as a faithful application of precedent, in fact it stretches precedent to reach the progressive result he sought. For example, in his *MacPherson* dissent, Chief Judge Bartlett in effect accused Cardozo of playing fast and loose with the idea of a “thing of danger” by treating automobiles to be no less “imminently dangerous to life” than “poisons, explosives, deadly weapons—things whose normal function it is to injure or destroy.”²⁵ Cardozo, he claimed, had taken a narrow exception to the privity rule first recognized for mislabeled poisons in *Thomas v. Winchester* and, without saying so, converted it into the opposite rule that privity is not required.

To take this view of *MacPherson* is, however, simply to fall for Buick Motor Company’s highly tendentious treatment of New York precedents—a treatment that,

²⁴ *Id.* at 1821-24.

²⁵ *MacPherson v. Buick*, 111 N.E. 1050, 1052 (N.Y. 1916); *id.* at 1056 (Bartlett, C.J., dissenting) (arguing that, under New York precedents, the privity rule admitted only of limited exceptions for especially dangerous products).

notably, only Bartlett accepted.²⁶ *Thomas v. Winchester*, which was decided more than a half century prior to *MacPherson*, did not rest on the idea that a special rule was needed only for those products whose point is to cause harm (and, indeed, the product in that case was intended as a medication, and only harmful because it had been mislabeled). Although a subsequent Court of Appeals decision—*Loop v. Litchfield*²⁷—had entertained this characterization of *Thomas*, the Court had abandoned it well before the time of *MacPherson*.

True, the litigants in *MacPherson* appear to have teed up two different interpretations of when New York negligence law would permit product manufacturers to be sued by persons not in privity with the manufacturer. On Buick's view, the product needed to belong to the *dangerous-by-its-very-nature* category. On MacPherson's, if the product was of a type such that it was *dangerous-when-negligently-made*—in the sense of 'an accident waiting to happen'—a duty of care was owed to a user who could be expected to face that danger. Yet the cases were hardly in equipoise as between these two interpretations. As Andrew Kaufman put it: "The New York Court of Appeals was already close to the *MacPherson* result, and Cardozo was most ready to innovate when the distance he had to travel from established law was small."²⁸ Already in *Devlin v. Smith*, decided in 1882, the New York Court of Appeals had rejected Buick's reading of the cases. *Devlin* had allowed a claim by injured workers against the manufacturer of a defective scaffold, notwithstanding the absence of privity. In so holding, it characterized New York law as holding that third parties can recover when "*the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it, is a natural and probable consequence of its use.*"²⁹ In other words, the Court of Appeals had already stated more than three decades before *MacPherson* that the relevant focus is on the dangerousness of the product *when carelessly made*, not the dangerousness of the product when made with care.

To make matters worse for Buick, in the decade immediately prior to *MacPherson*, the Court of Appeals had decided only two negligence cases involving plaintiffs not in privity

²⁶ This is perhaps a slight overstatement. Two of three judges on a Second Circuit panel had credited a similar privity argument a year earlier. *Cadillac Motor Car Co. v. Johnson*, 221 F. 801 (2nd Cir. 1915). Of course, under another 1842 decision—*Swift v. Tyson*, 41 U.S. 1 (1842)—the Second Circuit in *Johnson* was not strictly bound by New York precedents, though it purported to follow them. *Johnson's* adoption of this aggressively defendant-friendly interpretation is indicative of the sort of reasoning that contributed to the downfall of the general common law in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

²⁷ 42 N.Y. 351 (1870).

²⁸ ANDREW L. KAUFMAN, *CARDOZO* 275 (1998). Kaufman adds that Cardozo relied on "[a]nalogy, powered by public policy considerations" to "reformulate and improve the governing doctrine." *Id.* Kaufman's reference to "public policy" quite clearly is not meant to suggest that *MacPherson* is best understood as an exercise in forward-looking, instrumental reasoning, as opposed to an exercise in the interpretation of precedent. Indeed, Kaufman rightly emphasizes the absence of instrumentalist analysis in Cardozo's opinion. *Id.* at 272-73. As we understand it, his reference to "public policy" aims to capture the fact that Cardozo, like all good judges, deemed certain fairly obvious practical considerations to be relevant to the interpretation of precedent. *See infra* text accompanying notes 38 - 41.

²⁹ *Devlin v. Smith*, 89 N.Y. 470, 477 (1882) (emphasis added).

with the manufacturer: *Statler* and *Torgenson*. As noted above, *Statler* involved a coffee urn and *Torgenson* involved a bottle of seltzer water, and in both cases the absence of privity was deemed no bar to recovery. Neither a coffee urn nor a bottle of carbonated water has harm to humans as its *raison-d'etre*, and neither posed a baseline risk of injury so high as to warrant placing them in a separate category of extraordinarily dangerous products. And so Cardozo was hardly engaging in legerdemain when he rejected the narrow reading of *Thomas* once entertained by the Court in *Loop* and advocated in *MacPherson* by Buick: “whatever the rule in *Thomas v. Winchester* may once have been, it has no longer that restricted meaning.”³⁰

Cardozo’s *MacPherson* opinion is thus easily and rightly taken at face value. It says, with powerful precedential support, that New York common law is most cogently interpreted as requiring the manufacturer of a product to exercise due care towards persons beyond those in privity, if it is the kind of product that would seriously endanger life and limb if defective. Once this framework is recognized, one quite easily reaches the conclusion that car manufacturers owe a duty of care to those who would use the car without inspection and who could be expected to be injured if the car were carelessly made. By contrast, any effort to read it as a legislative decision that rests on instrumentalist policy analysis will inevitably be strained. Indeed, such a reading is so implausible that its most prominent advocates—Leon Green, Grant Gilmore, and Richard Posner—were forced to take desperate measures to salvage it. *MacPherson* doesn’t read like a policy decision, they say, only because Cardozo realized that, if he were forthright about his policy-oriented approach, he would scare off his audience (the hidebound bench and bar). In Gilmore’s phrase, Cardozo “went to extraordinary lengths to hide his light under a bushel.”³¹

In the manner of all good conspiracy theories, the Green-Gilmore-Posner reading is resistant to outright falsification. It is nonetheless readily shown to be feeble. Nothing in Cardozo’s voluminous writings—his opinions, his extra-judicial writings, his correspondence—suggest that he was engaged in this sort of misdirection in this or any other opinion. To the contrary, they suggest that what he wrote is what he meant. Likewise, there is no evidence that Cardozo was trained in, or comfortable with, the sort of policy analysis that is said to be the secret engine of his decision. Again, if anything, there is evidence to the contrary.³²

Gilmore, Posner and others have felt compelled to offer implausible interpretations of *MacPherson* because they supposed (correctly) that Cardozo was a great judge, and further supposed (incorrectly) that one cannot be a great judge without being an instrumentalist about adjudication. The latter supposition is but one expression of the familiar, though deeply confused, thought that, since law is a human creation that serves human purposes, it can only be applied and analyzed instrumentally. It should go without saying that practices and institutions created by humans often serve human purposes *indirectly*.

For example, professional baseball provides, among other things, entertainment, as well as fostering a form of loyalty that many fans find rewarding. It hardly follows that the

³⁰ *MacPherson v. Buick*, 111 N.E. 1050, 1052 (N.Y. 1916).

³¹ See Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1031 (1975); see also POSNER, *supra* note 11, at 109; Green, *supra* note 11, at 9.

³² John C. P. Goldberg, *Book Review: The Life of the Law*, 51 STAN. L. REV. 1419, 1440-41 (1999).

home-plate umpire employed for a particular game should call balls and strikes based on whether each call, or the run of calls, will make the particular game in question entertaining, or will promote fan loyalty. Our point is not to suggest, as Chief Justice Roberts famously once did, that the task of a Supreme Court justice closely resembles that of a home-plate umpire calling balls and strikes.³³ It is rather to support the simple and obvious (yet oft-ignored) point that practices and institutions often serve ends indirectly, through the observance and application of their rules, rather than through acts and decisions that are relentlessly instrumental.

In his insightful symposium contribution, Professor Witt generously credits us for capturing the way in which Cardozo approached legal issues from a perspective “internal” to the common law.³⁴ At the same time, he suggests that Cardozo’s conception of common law judging (and ours) is seriously incomplete, both intellectually and institutionally. Legal rules, Witt observes, must sooner or later account for themselves not by reference to what has been decided in the past, but on what they stand to accomplish. Similarly, common law courts must justify their role as but one among the many organs of modern government. While Witt claims that Cardozo acknowledged these truths, he also worries that Cardozo never explained (nor have we in our work) how to reconcile a commitment to precedent-based reasoning with law’s being a purposive institution, and never explained the place of the common law courts in the regulatory state. Witt suggestively concludes that there may be a Burkean story to tell here: that the common law’s backward-looking orientation and its insistence on principle might serve as a helpful counterweight to the forward-looking, rationalistic methods of the regulatory agencies that today are the face of government.³⁵

Our view and, we think Cardozo’s, is that Witt’s framing of the contrast between ‘internal’ and ‘external’ perspectives, and between common law and regulatory law, is too stark. Among the modern state’s, and modern law’s, purposes is the articulation of norms of interpersonal conduct, and the determination of the duties we owe and the rights that we have against one another. This is a task that judges have always undertaken and, by and large, are well equipped by their legal training and experience to undertake. And it is one that plainly connects to values that matter, including the value of encouraging responsible behavior and of holding people and firms accountable for mistreating others.

Common-law adjudication, meanwhile, can be and is both precedent-based and pragmatic. Indeed, Cardozo’s genius resided precisely in his ability to combine these dimensions of judicial decision-making, and to do so seamlessly. *MacPherson*, as admirers have long observed, is anything but a formalistic decision, but it is also not an exercise in

³³ Statement of John Roberts, Senate Judiciary Committee Hearings on the Nomination of John Roberts to Be Chief Justice of the Supreme Court (Sept. 12, 2005) (“I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it’s my job to call balls and strikes and not to pitch or bat.”)

³⁴ John Fabian Witt, Ives and MacPherson: *Judicial Process in the Regulatory State*, J. TORT LAW ___, __ (2016).

³⁵ *Id.* at __.

discretionary policymaking. It represents instead Cardozo's gift for synthesizing, refining, revising and pushing forward ideas immanent in the law.³⁶

In a lecture published eight years after *Macpherson* was decided, Cardozo described the state of the law prior to the decision as follows:

A mass of judgments, more or less relevant, had been rendered by the same and other courts. A body of particulars existed on which an hypothesis might be reared. None the less, their implications were equivocal. We see this in the fact that the judgment of the court was not rendered without dissent. Whether the law can be said to have existed in advance of the decision, will depend upon the varying estimates of the nexus between the conclusion and the existing principle and precedent.³⁷

If a "formalist" judge is one who supposes that common law adjudication involves a judge divining an uncontestably correct rule from prior decisions, Cardozo clearly was not a formalist. He concedes, after all, that there were different ways of understanding the "thing of danger" category. In turn, it might seem plausible to assert that Cardozo understood adjudication, at least in hard cases, to consist of an exercise in discretionary lawmaking, akin to legislation.

As many before us have pointed out, this last inference goes too far. It is one thing to concede, as practically everyone does, that, in hard cases, more than one rule can be fashioned. It is quite another to suppose that adjudication in such cases amounts to anything resembling *de novo* lawmaking on the model of legislation. Cardozo's use of the term "hypothesis" is quite helpful in capturing the space between these two ideas. First, it suggests

³⁶ In relation to the question of common law adjudication, Witt suggests that our 'umpiring' analogy (mentioned in the text above), while helpful to a point, is incomplete or misleading because it applies only to run-of-the mill judicial decisions, not decisions at the edges of precedent. A more apt baseball analogy for a case such as *MacPherson*, he suggests, might be the infamous "pine-tar" incident. *Id.* at __.

In a 1983 game between the Kansas City Royals and the New York Yankees, home plate umpire Tim McClelland disallowed a dramatic, ninth inning home-run hit by Royals star George Brett after Billy Martin, the Yankees manager, pointed out that there was pine tar – a sticky substance that helps batters grip their bats – more than 18 inches up from the handle of Brett's bat, in violation of league rules. Upon the filing of a protest by the Royals, American League President Lee MacPhail reversed McClelland's decision, reasoning (as he apparently had once before, ten years earlier) that the proper remedy for Brett's violation was seizure of the offending bat, not disallowance of the home run. The rule, he reasoned, was not a rule of fair competition but instead an economizing measure designed to reduce the number of baseballs that would need to be replaced during a game because smudged with pine-tar. Neither McClelland (who, of course, was required to make a more-or-less instantaneous ruling) nor MacPhail (who, with the benefit of the time for reflection accorded to judges offered a very *lawyerly* interpretation of the relevant rule) engaged in instrumental reasoning. Raymond Belliotti, *Billy Martin and Jurisprudence: Revisiting the Pine Tar Case*, 5 ALBANY GOV'T L. REV. 210, 217, 228-29 (2012). (MacPhail would also have been justified in reversing on the ground that the complainant – the insufferable Martin – opportunistically waited to complain about the bat until a moment in which it would matter, and thus lacked clean hands. *Id.* at 212-13.)

³⁷ BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 40-41 (1924).

that the immediate task at hand, even in hard cases, is that of inducing from prior decisions a rule or principle that will resolve the dispute before the court. Often, Cardozo suggested, the judge will be aided in this task by paying careful attention to the historical context in which prior decisions were made, as well as prevailing social practices (if any) among those whose conduct will most immediately be affected by the court's decision, and prevailing social norms. These legal, historical and sociological inquiries, he emphasized, are all in aid of making the best sense one can of the 'direction' in which the law is moving.

For Cardozo, it surely mattered that *Winterbottom* had been decided in 1842, and that, in the seventy five years leading up to *MacPherson*, a growing corpus of New York and English decisions had declined to apply the privity rule. It also mattered to Cardozo that prevailing political sentiments were arguably moving away from rugged individualism to less stringently individualistic forms of liberalism.

Whatever one may think of this sort of exercise, it bears little resemblance to the idea of a judge legislating based on his or her view of the consequences that will follow from adopting the rule. To be sure, Cardozo allowed that practical considerations could figure in the judicial resolution of a hard case. In particular, he accepted that the prospect of highly undesirable practical consequences was a ground for rejecting a rule that could otherwise claim validity in terms of its fit with precedent and practice. This was the upshot of an oft-quoted passage from another decision for which Cardozo wrote the opinion—*Ultramares Corp. v. Touche*.³⁸ *Ultramares* held that accountants should not be held liable to all persons who foreseeably might suffer economic loss as a result of their malpractice. Contrasting the scope of liability for fraud, Cardozo reasoned as follows:

A different question develops when we ask whether [the defendant accountants] owed a duty to [all creditors and investors of the audited firm] to make [the audit] without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes [it] to these consequences.³⁹

The point here is not that duty questions boil down to, or are constituted by, instrumental questions. Cardozo is not making a theoretical claim about the meaning of duty. Rather he is making a pragmatic point about judicial decision-making: the probable consequences of different duty rules are among the considerations that bear on the question of whether to recognize and how to define the duty owed by a certain kind of actor to certain classes of potential victim.

A similar approach to reasoning about duty, though it pointed toward a different result, is on display in *MacPherson* itself. Whatever plausibility *Winterbottom* may have once

³⁸ 174 N.E. 441 (N.Y. 1931).

³⁹ *Id.* at 444.

had, Cardozo's opinion asserted, it made little practical sense in an era in which car manufacturers had adopted the dealership model of distribution:

The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.⁴⁰

In other words, there would be something odd about inducing from New York precedents a rule of duty for product manufacturers according to which the *only* persons owed care are those who will interact with the products in a manner that will rarely, if ever, generate injuries, even as there are many others, to whom no duty is owed, who can be expected to interact with the same products in ways that will cause injuries. If manufacturers are to be subject to the law of negligence with respect to injuries caused by their products, they surely must be held to owe duties to at least some of the persons whom they predictably will injure through their carelessness. This is exactly the principle that runs through the pre-*MacPherson* case law: insofar as a product that will be sent out into the world without being further inspected for safety is a product that poses a probable danger to certain classes of persons, the manufacturer's duty is owed to those persons.

In rejecting the view that Cardozo was being an activist judge and in rejecting the instrumentalist account of his opinion, we are not denying that both moral and practical considerations figured in his decision. To the contrary. The point is that the question of whether Buick had a duty of care to product users like *MacPherson* is *not shorthand* for whether there should be liability. Rather it is, to a very significant extent, what it appears to be—namely, the practically and morally informed extraction of a principle from precedent.⁴¹ Judges who are charged with overseeing how tort suits will proceed are being asked whether the law makes it incumbent upon a car manufacturer to be vigilant of the life and limb of car users. Focusing on what would be relevant to answering the moral question—what sorts of interests are being risked, how much reliance there is, how well situated users are to protect themselves—Cardozo of course answered that there is such a duty. To put the point somewhat more sensitively, Cardozo decided that, given this constellation of circumstances,

⁴⁰ *MacPherson v. Buick*, 111 N.E. 1050, 1053 (N.Y. 1916).

⁴¹ We would *not* go so far as to suggest, in the manner of Dworkin, that Cardozo adopted the interpretation of New York precedents that rendered them the 'best they can be' from the perspective of morality. It was enough, in Cardozo's view, to adopt an interpretation of the law that rendered it morally plausible. Relatedly, unlike Dworkin's Hercules, we do not regard *MacPherson* to be best interpreted as stating the rule that all foreseeable victims of all kinds of carelessly caused harm are owed a duty of care. RONALD DWORKIN, *LAW'S EMPIRE* 238-50 (1986) (suggesting that the reading of *MacPherson* and other precedents that renders them morally most attractive is one that would recognize a general duty to take care against causing others to suffer emotional distress).

the absence of a contractual relationship did not suffice to establish that there was no legal duty of care owed to product users.

C. Negligence as a Wrong

Insofar as *MacPherson* is taken to herald the arrival of a nonwrongs-based, purely instrumental conception of strict products liability, it has been badly miscast. To see this, one only need to contrast Cardozo's language to that of Traynor in *Greenman*⁴² (quoted above):

If the nature of a thing is such that it is reasonably certain to place and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. . . . There is here no break in the chain of cause and effect. In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.⁴³

Quite evidently, Cardozo's line of attack on the privity rule come from within a moralized understanding of negligence as a legal wrong. The principle he puts forward is not about where costs are best placed to provide compensation or achieve deterrence, but about who is really responsible for an injury.

Nor was *MacPherson* an outlier within Cardozo's judicial corpus. In fact, he quite consistently displayed reluctance to shift from negligence to strict liability, even when facing a claim by a vulnerable individual against a corporate defendant that was well situated to bear the cost. In *Adams v. Bullock*, for example, Cardozo ruled that a trolley company could not be held liable in negligence to a boy who was electrocuted when a long piece of wire that the boy was dangling over the edge of a bridge made contact with the company's uninsulated wires.⁴⁴ Liability could not be imposed, he concluded, because there was nothing about the particular location of this incident that should have alerted the company to a heightened risk of injury and hence a need to take particular precautionary measures there. Moreover, the taking of systemic measures to avert such injuries would have demanded of the trolley company something well beyond reasonable care: namely, the abandonment of the enterprise in anything like the form in which it had operated. To hold the trolley company liable on these terms would have been to treat it as an "insurer" of electrocution victims.⁴⁵ Negligence is negligence, *Adams* insists. It is not strict liability.

⁴² See *supra* text accompanying note 17.

⁴³ *MacPherson*, 111 N.E., at 1053.

⁴⁴ 125 N.E. 93 (N.Y. 1919).

⁴⁵ *Id.* at 94.

In light of *Adams* and other decisions, it is implausible to read *MacPherson* as somehow downplaying the connections between negligence liability and ordinary notions of wrongdoing and responsibility. So far as Cardozo was concerned, when a court sets about determining whether a defendant should be held liable to a plaintiff for negligence, it aims to determine whether, under existing doctrine or a fair extension of it, the defendant can be held responsible to the plaintiff for having carelessly injured the plaintiff. And this determination requires judgments as to the *wrongfulness* of the defendant's conduct.

Our point is not that Cardozo was inalterably opposed to all forms of 'strict' liability. There are genuine legal wrongs that involve the violation of strict standards of conduct — most notably in contract law but also in certain applications of tort law—and Cardozo was clearly open to recognizing at least some of these.⁴⁶ For example, in *Ryan v. Progressive Stores*, a grocery store that sold a loaf of bread with a pin inside of it was held liable to the plaintiff, whose mouth was injured when he bit into the bread.⁴⁷ Cardozo was willing to impose warranty-based liability on the retailer notwithstanding that the bread was baked by someone else and was sold in a sealed container: the failure of the product to meet the quality standards that the retailer had implicitly warranted was sufficient. In short, Cardozo regarded it as a wrong, in and of itself, for a seller to injure a consumer by selling the consumer a dangerously substandard product, irrespective of the degree of care exercised by the seller. It is clear, however, that Cardozo regarded the wrong in *Ryan* as a contractual wrong—a breach of an implicit term of the agreement between retailer and consumer—rather than a tort wrong.

Whether Cardozo would have been willing to recognize strict, warranty-like liability in tort rather than contract, and thus treat causation of injury through the sale of a dangerously defective product as a wrong irrespective of any promise of quality, is an open question. However, even if he would have, the idea of treating injury through the sale of a defective product as a *wrong* is quite distinct from the idea of strict products liability as an instrument for the achievement of compensation and deterrence. And it is the latter idea that is at the heart of *Escola* and *Greenman*. In stark contrast to Cardozo's antipathy to insurance rationales within the domain of legal wrongs, these authorities favored a fusion of warranty and tort precisely so that liability could be used to spread the cost of injuries, to spare plaintiffs the challenge of proving wrongdoing, and to improve deterrence. None of these rationales figured in *MacPherson*. To the contrary, Cardozo clearly thought about Buick's responsibility in the more traditional, duty- and wrong-based terms of the common law of torts.

III. ONE HUNDRED YEARS ON: THE COSTS OF MISUNDERSTANDING *MACPHERSON*

The long tradition of misreading *MacPherson* is, alas, not merely an academic matter. It has instead helped to fuel a series of problematic developments in law and legal theory. Here we briefly sketch some of those problems.

⁴⁶ John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 *FORDHAM L. REV.* ____ (2016) (forthcoming).

⁴⁷ 175 N.E. 105 (N.Y. 1931).

A. Taking Responsibility Seriously

The non-relational conception of duty looks progressive because it seems to sit well with the following sentiment. *Never mind the issue of whether manufacturers ought to conceive of consumers as persons to whom care is owed: that issue, if it is even cogent, simply obscures the real question, which is whether a person hurt by a product should be able to recover, absent privity. Responsibility to consumers is aspirational and moralistic; liability is real.*

On our view, it is a huge mistake to put aside the question of to whom vigilance and care is owed and to focus exclusively on liability-as-threat. The law needs more tools in its tool kit. Large businesses are costly to sue, are often well-positioned to stonewall, and can frequently defeat even plausible claims. It surely *is* important that consumers have the power to sue manufacturers, to recover damages from them, and to negotiate for compensation against a background where there is an enforceable legal right. But Cardozo was onto something even more important.

Companies that make products may be artificial entities, but they still have responsibilities. It is critical that those who work for manufacturers maintain a self-conception as actors who take consumers' safety to be important. We as a society want the social safety norms that govern interpersonal interactions to govern business conduct, too. The increasing dependence on 'liability rules' for social control of corporate conduct is often inefficient and ineffectual. Large companies and those who control them need to operate in a way that mimics the actions of natural persons—they need to understand themselves as *obligated* to be vigilant of risks to their consumers and to act accordingly.

Our point is far less precious than it might seem. Twentieth Century corporate law in fact made a psychological turn of the sort we are advocating, albeit in a different context. It is now standard fare for judicial decisions, and for law school and business school courses, to emphasize that corporate directors and managers must take very seriously the fiduciary duties they owe to shareholders.⁴⁸ The point, it seems, is to guide directors' conduct—to force them to frame decisions (in tender offer cases, for example) in a way that puts shareholders' financial interests ahead of the interests of current management, employees, or local communities. Corporate law is telling these actors how they are supposed to think about their responsibilities and it is using the language of duty to do so. For better or worse, this message seems to have affected how these actors actually think about their responsibilities.⁴⁹

The example of legal duties to shareholders has two important implications for our analysis. First, it provides a concrete example of how a way of understanding duties, even in the 'bottom-line' oriented domain of business, might actually translate into an adjustment in

⁴⁸ See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003) (arguing that corporate directors bear ultimate decision-making authority within a corporation, but that this authority is subject to a fiduciary duty, contractual in origin, that requires them to make decisions that maximize shareholder wealth, and that precludes them from pursuing conflicting objectives).

⁴⁹ *Id.* at 575-76 (asserting that directors probably tend to “adhere to the shareholder wealth maximization norm”).

norms and conduct, and does by means other than a mere threat of liability divorced from a notion of wrongdoing. The second point goes in a different direction. The importance, today, of having publicly held companies be vigilant of consumers' physical well being is especially great precisely because of the increased focus on shareholders. The *duty* to maximize shareholder well-being must be pursued within the limits of the law (at least in principle). But if tort law is understood in terms of liability rules, rather than actual mandatory duties of conduct, then we have set things up so that risking tort liability in the corporate decision-making context may actually seem, from the internal point of view of the corporate actor, to be the legally correct choice.

One need not join Occupy Wall Street to see a serious problem with the current state of thinking on corporate responsibilities. Were one to look at publicly held pharmaceutical companies, for example, one might well find a striking contrast between managerial attitudes toward contract and tort. Managers probably view their legally imposed fiduciary duties to shareholders as having obligatory force. At the same time, they probably tend to view tort as merely a collection of liability rules: the cost they will incur if consumers are hurt by defects in their products, if those consumers sue, and if the cases cannot be fended off. The irony is thick. 175 years after *Winterbottom*, contract—in the form of duties to shareholders—is back on top, even in the *Thomas v. Winchester* domain of dangerous drugs. Tort duties, meanwhile, are given less than full credence. Read rightly, Cardozo's *MacPherson* opinion points in a very different direction.

B. Instrumentalism and Tort Reform

No doubt there is something temperamental or personal about our preference for pragmatic conceptualism over reductive instrumentalism—for Cardozo over Holmes, and, yes, for Dworkin over Posner. But it is entirely wrong to suppose that, by rejecting instrumentalism, we are favoring a politically conservative agenda over a politically progressive one. True, in the middle of the twentieth century, it was usually progressives who advocated an instrumentalist approach to tort law. But our whole point is that there was, back then, and is now, a different, and better way to get to a more progressive tort law, and it is the one found in *MacPherson*. A huge part of our anti-instrumentalist agenda has been rooted in the idea that instrumentalism in tort law has become a battering ram for a well-funded and vigorous tort reform movement, both in courts and in legislatures.

As to the courts, Prosser's avowedly reductive analysis of duty at first did serve as a progressive mantra, particularly for the California Supreme Court in decisions such as *Rowland*, *Dillon*, and *Tarasoff*.⁵⁰ But for the last 35 years, judges and justices who came of age in the tort reform era see Prosser's famous "shorthand for policy" quip in a wholly different way. Ensuring compensation and deterrence are no longer major policy objectives, or at least are not thought to be best implemented through tort law. When it comes to torts, courts worry incessantly about floodgates and frivolous litigation, rising costs of products and services due to liability insurance, and the distorting effects of tort liability on

⁵⁰ John C. P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 329-30 (2006) (reviewing these and other California decisions).

spontaneous activities of ordinary people. We are not saying these concerns do not matter. Sometimes they do. We are merely observing, from the vantage point of 2016, how shortsighted and *unrealistic* it is to suppose that, if courts are told that “duty” is simply a blunderbuss policy decision, they will move the law in a progressive direction.

As we are (appropriately) celebrating *MacPherson* at a meeting in New York, it is fitting to mention a recent Second Circuit decision, *Munn v. The Hotchkiss School*.⁵¹ The plaintiff, Cara Munn, a 15 year-old student, was bitten by a tick in the forests of Northeast China while on a hike organized by her prep school. The tick carried encephalitis, and the plaintiff consequently suffered permanent and serious brain damage. Hotchkiss Academy, the defendant, had failed to warn students of the risk of serious insect-borne illnesses in this region. Moreover, it had not directed or encouraged the students to wear long clothing or insect repellent; and it allowed her and her friends to take an especially dense and buggy path from the top of the mountain they had climbed. In the District Court in Connecticut, a jury awarded the plaintiff \$10 million in economic damages and \$31.5 in non-economic damages. Hotchkiss argued on appeal that students and society would suffer if schools were forced to discontinue field trips because of fear of liability, and hence the Second Circuit should rule that the school owed its students no duty of care. While the Second Circuit did not accept this argument, it did not reject it either, instead certifying the duty issue to the Connecticut Supreme Court, along with the issue of whether the damages were excessive under Connecticut law.

We see the policy argument of course, and we see a potential basis for supposing that the Second Circuit should order a new trial on damages. Perhaps a careful review of the record might even suggest the propriety of entering judgment as a matter of law for the defendant on the issue of breach or causation. But there is no serious argument that Hotchkiss should prevail on its no-duty argument. As a matter of Connecticut law, and the law of other states, it would be absurd to suggest that a school owes no duty of care to its minor students. Yet Hotchkiss’s lawyers, seizing on the Prosserian language of prior Connecticut Supreme Court decisions, are understandably trying to use the modern “no duty” rubric to enact a bit of tort reform. Over and over again, these sorts of defense gambits have worked. We hope they do not in *Munn*.

Our point on tort reform and instrumentalism concerns not only courts but also legislatures. Indeed, since the heyday of progressive instrumentalism in the 1960s and 70s, the most substantial changes in tort law have been made in the statehouse, not the courtroom. This is no coincidence. Our understanding of tort law as rooted in principled common law reasoning made courts the obvious place for change and development. By contrast, if tort law—at an appellate level—is really just judicial policymaking, then there is no reason to presume it belongs in the domain of the judiciary. Legislatures, it is supposed, are better at getting the big picture of policy implications. Even if not, they enjoy democratic authority that judges often lack. The conception of tort law as rooted in instrumentalist reasoning has quite naturally led to a devolution of control from courts to legislatures. This is not to deny that legislatures have always been entitled to exercise such power, nor that they sometimes did exercise that power. But today, in dozens and dozens of states, the

⁵¹ 795 F.3d 324, 331-35 (2nd Cir. 2015).

institutional understanding has shifted on who will be making the law about who can sue whom for what and how much they will receive if they win. Needless to say, we think the partial shift of de facto tort lawmaking to legislatures has been something of a disaster.

C. Mistaking Regulation for Redress, and Redress for Regulation

We have argued that scholars have overstated the continuity between *MacPherson* and strict products liability. This, too, is a mistake of some moment, but it is admittedly more difficult to see why.

Preliminarily, we recognize that progressives have sometimes benefited by depicting strict products liability as simply an extension of negligence. Even today, a substantial domain of strict products liability law remains in place, notwithstanding the efforts of businesses and some academics to discredit it. Contemporary efforts to cast strict products liability as based on risk-utility analysis, and hence largely continuous with negligence, have amounted to a rewriting of legal history. Arguably, however, the rewrite was well-motivated and somewhat successful in warding off more aggressive tort reform. We shall leave this point to one side, for the moment, and depict the other side: the regressive consequences of overstating the continuity between *MacPherson* and strict products liability.

First, the mythical supposition that there is no real gap between *MacPherson*'s application of negligence law and *Greenman*'s recognition of strict products liability, though originally offered by Traynor and others to justify the emergence of the latter doctrine, is today being harnessed in the opposite direction, to pull products liability back toward negligence. In particular, the Products Liability portion of the Third Torts Restatement puts forward several provisions that articulate a view of products liability as really just a form of negligence, and several of those provisions tend to be much more helpful to defendants than current doctrine in many states. Requiring design defect plaintiffs to prove that the product fails the risk-utility test, rather than the consumer expectation test, is a clear example.⁵² Another move benefitting defendants was the expansion of the notion that state-of-the-art sets a limit on product defectiveness, and the related abandonment of hindsight-based standards of defectiveness.⁵³ The decision to have comparative fault apply to products liability law—recognized in, though not led by, the Restatement—was also a move in the direction of negligence law.⁵⁴

Second, numerous jurisdictions now seem to view central features of strict products liability as anomalous and unfair—bridling at what strikes them as ‘naked’ redistribution—and have therefore changed them via legislative reform. Most notably, several states have enacted “closed container” laws that eliminate the possibility of strict liability for retailers who sell defective products that are sent by the manufacturer in sealed packaging.⁵⁵ These reforms rest in part on the intuition that tort law is simply too inattentive to ordinary notions

⁵² RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) & cmt. *g* (1998).

⁵³ *Id.* at § 2(b) & cmt. *f*

⁵⁴ *Id.* at § 17; *id.* at Reporters' Note to cmt. *a* (reviewing a split among courts on whether to recognize comparative fault as a defense to products liability claims).

⁵⁵ 1 MARSHALL S. SHAPO, SHAPO ON THE LAW OF PRODUCTS LIABILITY § 12.04[C], at 12-87 - 12-93 (2013) (discussing statutes limiting retailer liability for product defects).

of fairness and responsibility when it imposes liability on perfectly innocent retailers merely to serve goals such as compensation or deterrence. In other words, they play on the picture of strict retailer liability as regulation and redistribution. As we noted above, Cardozo himself accepted the imposition of liability for a dangerous product causing injury in a closed container case, but relied upon warranty to do so.⁵⁶ On this approach, one might be able to fashion a justification for strict retailer liability on the ground that a commercial seller's injuring of another person through the sale of a defective product is a distinct, strictly defined wrong—one that it is difficult to avoid committing, sooner or later—within the family of legal wrongs that constitutes tort law. However, the mythical account of *MacPherson's* connection to strict liability, which purports to locate that connection in an underlying commitment to a regulatory conception of *tort* liability, cannot take advantage of this line of reasoning, and instead renders strict retailer liability vulnerable to the objections that have given rise to statutory reforms.

Finally, it is important to keep in mind that the most impressive judicial movement against tort liability in the past two decades has been the Supreme Court's aggressive application of preemption doctrine. In developing this doctrine, the Supreme Court has managed to sheer away a significant amount of liability for medical devices and prescription drugs and of course some—less systematically—for other products. In our view, both in its 8-1 decision on medical devices,⁵⁷ and its 5-4 design defect decision on generic drugs,⁵⁸ the Court managed to enact a sort of back-door tort reform only because of its failure to attribute adequate significance to the real differences between defect-based strict products liability and negligence law.

Justice Alito's *Bartlett* opinion exemplifies the problem most clearly. Impossibility preemption applies only where the requirements of state law and the requirements of federal law are impossible to satisfy simultaneously. The defendant, Mutual Pharmaceutical, argued that any design defect tort action under New Hampshire state law was inconsistent with the federal-law *requirement* that it design its drug Sulindac to match the brand name drug Clinoril, of which Sulindac was a generic version. The respondent, Bartlett, argued that New Hampshire products liability law was strict, and therefore not regulatory in a sense that constitutes a *requirement*. On that basis, she argued, impossibility preemption was inapplicable. Writing for the Court, Justice Alito disagreed:

We begin by identifying petitioner's duties under state law. As an initial matter, respondent is wrong in asserting that the purpose of New Hampshire's design-defect cause of action "is compensatory, not regulatory." Brief for Respondent 19. Rather, New Hampshire's design-defect cause of action imposes affirmative duties on manufacturers.

Respondent is correct that New Hampshire has adopted the doctrine of strict liability in tort as set forth in Section 402A of the Restatement (Second) of Torts. See 2 Restatement (Second) of Torts § 402A (1963 and 1964) (hereinafter Restatement

⁵⁶ See *supra* text accompanying note 47.

⁵⁷ *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

⁵⁸ *Mutual Pharmaceutical Co. v. Bartlett*, ___ U.S. ___, 133 S. Ct. 2466 (2013).

2d). See *Buttrick v. Arthur Lessard & Sons, Inc.*, 110 N. H. 36, 37-39, 260 A. 2d 111, 112-113 (1969). Under the Restatement — and consequently, under New Hampshire tort law — “[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused” even though he “has exercised all possible care in the preparation and sale of the product.” Restatement 2d § 402A, at 347-348.

But respondent’s argument conflates what we will call a “strict-liability” regime (in which liability does not depend on negligence, but still signals the breach of a duty) with what we will call an “absolute-liability” regime (in which liability does not reflect the breach of any duties at all, but merely serves to spread risk). New Hampshire has adopted the former, not the latter. . . .⁵⁹

What is stunning about this passage is that it uses the term “conflates” in place of an argument, as if melding together duty-based liability based on the sale of a dangerous product and risk-spreading were an intellectual confusion or mistake. A great deal of what *Greenman* and 402A were about was finding a middle ground between a mandate-like message for products manufacturers about what care they must take in marketing products, on the one hand, and treating them simply as deep pockets or insurers for a group of products users, on the other. Traynor, Prosser and others thought there was such a middle ground, in which defect-based liability simultaneously spread risk and incentivized safety. The Second Restatement and most state courts and legislatures adopted strict products liability because they shared that view, at least for manufacturing defects and design defects. From our brief study, the courts of New Hampshire largely accepted that view, too.

Our two earlier examples—closed container statutes, and the changes wrought by the products liability provisions of the Restatement (Third)—help to crystallize the admittedly slippery point we are making about *Bartlett*, and push it one step further. Strict products liability in tort, at least for manufacturing defects and design defects and at least in some jurisdictions in its first generation, was crafted to serve a compensatory and risk-spreading function, but to do so in a qualified way by requiring proof of defect, as opposed to imposing ‘absolute’ liability that would extend even to injuries caused by sound products. Liability for design defect based on a product’s failure to meet consumer expectations, or based on a failure to satisfy a hindsight-based version of the risk-utility test, pursued compensation and deterrence by adopting a form of liability that lies somewhere in between negligence and absolute liability. That is what strict products liability, at least in its initial formulations, was all about.

Cardozo on the New York Court of Appeals and Traynor on the Supreme Court of California were both great common law judges, but their approaches were not the same. Cardozo sought to modernize tort law while remaining true to the idea that torts are not merely wrongs in name, but hinge liability on the actual commission of a wrong. Traynor fused negligence and warranty so as to eliminate the wrongfulness of a defendant’s conduct as a basis for liability, even though liability was still said to sound in ‘tort.’ Insofar as other states followed Traynor’s approach, they adopted a qualified liability-rule approach to

⁵⁹ *Id.* at 2473.

product-related injuries in which liability does *not* hinge on the breach, by sellers, of a genuine obligation to alter their conduct to avoid causing injuries to consumers.

Why did Justice Alito and four other members of the Court get this wrong? No doubt there is some truth in the standard observation that the ‘right wing’ of the Roberts Court is pro-business and friendly to tort reform. But a large part of the answer, we think, goes back to a misunderstanding of *MacPherson* as an early anticipation of late mid-late Twentieth Century products liability law. Negligence and strict products liability are importantly different. Even if—as we mentioned much earlier in this section—there has been substantial success in the effort to preserve a robust law of products liability in the United States by pushing it back toward negligence law, this does not undercut our first point: it matters whether one has a tenable view of what *MacPherson* stands for.

CONCLUSION

Standard accounts of *MacPherson*’s virtues fail, for they are based on myths: the myth that Cardozo rejected relational duty in favor of a simple duty to the public at large; the myth that he hid an instrumental policy argument beneath the verbiage of common law decision-making; and the myth that he endorsed an avowedly instrumental conception of negligence that pointed directly to a comparably instrumental conception of strict products liability. The myths are not themselves harmful. The problem is what they hide: that relational duty fits into the modern world and is essential to a progressive negligence law; how moral and pragmatic thinking fit within common law reasoning; and that—even though negligence can and does move with the times—the strict products liability envisioned by the likes of Traynor in the 1960s and 1970s was its own, special progressive idea. The Legal Realism at the root of the myths of *MacPherson* is not so much pernicious as it is shallow. The application of the methods of common law legal reasoning to torts cases is not a charade but a challenge. One hundred years after *MacPherson v. Buick*, there is still plenty we can learn from Judge Cardozo about how that challenge is best met.